

BRIAN M. ROTHSCHILD (Bar No. 252573)
DARREN NEILSON (Bar No. 276159)
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: 801.532.1234
Facsimile: 801.536.6111
Email: BRothschild@parsonbehle.com
DNeilson@parsonbehle.com

Attorneys for NORTH FORTY CONSULTING LLC

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

BUNSOW DE MORY LLP, a California limited liability partnership.

Case No. 3:20-CV-04997

**Plaintiff and Counterclaim
Defendant,**

**NORTH FORTY CONSULTING LLC'S
NOTICE OF MOTION AND MOTION
UNDER FED. R. CIV. P. 60(b) FOR
RELIEF FROM PROVISIONS OF
ORDER RE: PLAINTIFF'S MOTION
FOR JUDGMENT ON THE PLEADINGS
& ADMINISTRATIVE MOTIONS TO
SEAL**

NORTH FORTY CONSULTING LLC, a
Delaware limited liability company.

Filing Date: July 24, 2020
Trial Date: December 6, 2021

Hearing Date: March 18, 2021
Hearing Time: 9:00 am
Courtroom: E, 15th Floor
Judge: Hon. Jacqueline Corley, M.J.

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD: Please take notice that on **March 18, 2021 at 9:00 am (PST)**, before the Honorable Magistrate Judge Jacqueline Scott Corley in the United States District Court for the Northern District of California, Courtroom E, located on the 15th Floor of the San Francisco Courthouse at 450 Golden Gate Avenue, San Francisco, California 94102, or via remote access at the Court's preference pursuant to the Northern District of California's guidelines regarding the COVID-19 pandemic, Defendant and Counterclaimant North Forty Consulting LLC ("North Forty"), by and through counsel, hereby move (the "**Motion**") for an order under Federal Rules of Civil Procedure 60(b) for relief from provisions of the order granting in part and denying in part Bunsow De Mory LLP's ("**BDIP**") motion for judgment on the pleadings (the "**Motion for Judgment on the Pleadings**") [Docket No. 35]. As set forth more fully in the accompanying Memorandum of Points and Authorities, the Court's ruling departed from its oral ruling at the hearing, prejudicing North Forty's attempts to amend its Complaint. Given the difference between the Court's oral ruling at the hearing and the entered order and the prejudice to North Forty, North Forty has filed the within Motion.

Dated: 02/10/2021

PARSONS BEHLE & LATIMER

By: /s/ Darren Neilson
BRIAN M. ROTHSCHILD
DARREN NEILSON
Attorneys for NORTH FORTY
CONSULTING LLC

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND STATEMENT OF FACTS AND PROCEDURAL**
 3 **HISTORY**

4 1. On September 22, 2020, North Forty filed its Answer, Affirmative Defenses, and
 5 Counterclaims to BDIP's Complaint ("Counterclaim") [Docket No. 18]. After discussions with
 6 counsel for BDIP and prior to BDIP's answer to the Complaint, North Forty filed its First Amended
 7 Answer, Affirmative Defenses, and Counterclaims to BDIP's Complaint ("First Amended
 8 Counterclaim") [Docket No. 27].

9 2. On October 23, 2020, the Court entered its Pretrial Order setting, among other
 10 things, January 8, 2021 as the deadline to move to amend pleadings.

12 3. On November 19, 2020 BDIP filed its Motion for Judgment on the Pleadings
 13 [Docket No. 35], initially setting the hearing for December 24, 2020.

14 4. The Court moved the hearing on the Motion for Judgment on the Pleadings from
 15 December 24, 2020 to January 07, 2021. The Court then moved the hearing one more time from
 16 January 07, 2021 to its current schedule of January 14, 2021.

18 5. BDIP's Motion for Judgment on the Pleadings requested and order granting
 19 judgment on the pleadings for BDIP's first and second claims for relief.

20 6. North Forty, in its Opposition to BDIP's Motion for Judgment on the Pleadings
 21 requested that should the Court grant BDIP's Motion for Judgment on the Pleadings, North Forty
 22 be allowed to amend the First Amended Counterclaim.

23 7. In an abundance of caution, North Forty filed a Motion for Leave to File a Second
 24 Amended Counterclaim ("Motion for Leave to Amend") [Docket No. 50], setting a hearing date
 25 of February 18, 2021.

1 8. At the January 14, 2021 hearing on the Motion for Judgment on the Pleadings (the
 2 “**Hearing**”), the Court orally ruled granting BDIP’s Motion for Judgment on the Pleadings on both
 3 its first cause of action and its second cause of action. With regards to the second cause of action,
 4 the Court orally allowed North Forty the right to amend its pleadings. Furthermore, the Court also
 5 ruled that North Forty’s Motion for Leave to Amend was now moot in light of the Court’s ruling.
 6

7 9. On or about January 22, 2021, the Court entered its order on the Motion for
 8 Judgment on the Pleadings in which the Court granted BDIP’s motion for judgment on the
 9 pleadings as to the first cause of action and denied as to the second cause of action (the “**Modified**
 10 **Order**”). The Court went further in its Modified Order and further narrowed North Forty’s
 11 counterclaim that the [REDACTED] paid to BDIP on the Acacia sale as complained by North Forty
 12 only applied to the February 2020 agreement and not the April 20, 2020 agreement. This is despite
 13 North Forty specifically making the argument at the hearing that the Acaicia deal was “paused”
 14 and not two separate deals.
 15

16 10. The issues pointed out by the Court at the hearing as to the limits in North Forty’s
 17 pleadings were going to be amended and fixed by North Forty. Furthermore, as the Court had
 18 granted North Forty’s request to amend, North Forty did not raise additional arguments in support
 19 of amendment to the First Amended Counterclaim. The Court’s departure from its oral ruling
 20 prejudices North Forty as it lost its hearing on the Motion to Amend and also lost its right to amend
 21 as allowed by the Court at the hearing on BDIP’s Motion for Judgment on the Pleading.
 22

23 As such the modified order should be vacated under FRCP 60(b).

24 **II. ARGUMENT**

25 Federal Rules of Civil Procedure 60(b) Allows the Court to Vacate or Reconsider and Amend the
 26 Modified Order.

1 FRCP 60(b) provides, in relevant part, as follows:

2 **Grounds for Relief from a Final Judgment, Order, or**
Proceeding. On motion and just terms, the court may relieve a party
 3 or its legal representative from a final judgment, order, or
 proceeding for the following reasons:

4 (1) mistake, inadvertence, surprise, or excusable neglect;
 5 [or] . . .

6 (6) any other reason that justifies relief.

7 A motion filed pursuant to Rule 60(b)(6) (“any other reason justifying relief”) must be brought
 8 within a reasonable time. *In re Pac. Far East Lines, Inc.*, 889 F.2d 242, 249 (9th Cir. 1989). The
 9 Debtor timely brought this Motion within fourteen days after the entry of the Modified Order.

10 The Court should allow North Forty to amend its First Amended Counterclaim to add
 11 additional information in the possession of North Forty with regards to the Acacia deal. The
 12 Modified Order incorrectly reversed the Court’s ruling at the Hearing and was without notice to
 13 North Forty causing surprise on the part of North Forty. The deadline to move the court for to
 14 amend the pleadings has passed, and North Forty relied on the Court’s oral ruling at the Hearing
 15 to not pursue its Motion to Amend. North Forty has been prejudiced by the Modified Order.

16 The Modified Order Departs from the Court’s Ruling at the Hearing and North Forty Should be
 17 Allowed to Amend it Pleadings.

18 The Modified Order is a reversal of the Court’s ruling at the Hearing on the BDIP’s Motion
 19 for Judgment on the Pleadings. The Court’s oral ruling at the Hearing should be enforced and
 20 North Forty should be allowed to amend its First Amended Counterclaim.

21 In general, “[t]he court may, in furtherance of justice, and on any terms as may be proper,
 22 allow a party to amend any pleading[.]” Cal. Civ. Proc. Code § 473(a)(1); see also Cal. Civ. Proc.
 23 Code § 576 2 (“Any judge, at any time before or after commencement of trial, in the furtherance
 24 of justice, and upon such terms as may be proper, may allow the amendment of any pleading.”).

25 “There is a strong policy in favor of liberal allowance of amendments.” *Mesler v. Bragg Mgmt.*

26

Co., 39 Cal. 3d 290, 296 (1985). If the granting of a timely motion for leave to amend “will not prejudice the opposing party, it is error to refuse permission to amend, and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action[;] it is not only error but an abuse of discretion.” *Morgan v. Super. Ct.*, 172 Cal. App. 2d 527, 530 (1959) (finding that the trial court acted arbitrarily and abused its discretion when it denied a motion for leave to file an amended complaint that was filed before a trial date had been set).

Given the departure between the Court’s oral ruling at the Hearing and the Modified Order, and the strong policy in favor of the liberal allowances of amendments, the Court should modify the Modified Order and allow North Forty to amend if First Amended Counterclaim.

CONCLUSION

For the reasons stated above North Forty requests that the Court modify the Modified Order to provide that North Forty has fourteen (14) days from the entry of the modified Modified Order to file a second amended answer and counterclaim as to the Acacia deal. The Modified Order goes beyond, and in fact reverses, the ruling made by the Court at the Hearing, has significant implications for the North Forty, is unsupported by a noticed motion or opportunity to be heard, has caught North Forty by surprise, and is against the liberal public policy of granting amendments to pleadings.

Dated: 02/10/2021

PARSONS BEHLE & LATIMER

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